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FEDERAL COMMUNICATIONS COMMISSION
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In re Petition of)
)
UNITED STATES CELLULAR CORPORATION)
)
To Delete or Nullify the Effect)
Of Footnote 3 of the Commission's)
Final Order in CC Docket No.)
90-257)

CC Docket No. _____

To: The Commission

RESPONSE TO REPLY

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April 8, 1993

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Summary

Potosi Company ("Potosi") has requested the Commission to strike down the "shotgun" and the "supermajority" provisions in the agreements governing the management of Mississippi Cellular Telephone Company on the grounds that those provisions afford Telephone and Data Systems, Inc. ("TDS"), undue influence over licensee affairs. And Potosi is among the parties that have relied on Footnote 3 of the Commission's final order in CC Docket No. 90-257, La Star Telephone Co., 7 FCC Rcd 3762, 3767 n. 3. (1992), to ask the Commission to afford consolidated consideration to the pattern of misconduct displayed by TDS as a "minority" participant in cellular ventures.

I

Potosi presented documentary evidence refuting TDS' claim that H. Donald Nelson, President of United States Cellular Corporation (a TDS subsidiary), was not involved in activities in 1987-88 on behalf of La Star Cellular Telephone Co. ("La Star"). Potosi alleged that records of telephone conversations dating back to 1987 and 1988 constituted probative, documentary evidence that Nelson was personally involved in significant La Star activities; that he was capable of "orchestrating" the activities of La Star's attorney, Arthur Belendiuk, and its consulting engineers; and that Mr. Belendiuk considered Nelson to be a decision-maker.

TDS never challenged the authenticity of the documents, nor disputed their accuracy. Rather, TDS brought Nelson and Belen-

diuk forward to recall telephone conversations they had more than five years ago.

II

Belendiuk seems to recall that in late 1987 Sinclair Crenshaw of SJI Cellular, Inc. ("SJI") came up with the idea of having Nelson contact James Creekmore to secure "the consent of the Biloxi wireline licensee to a switch sharing agreement and a 39 dbu contour extension into the Biloxi MSA" that would result from La Star's proposed interim operation.

The facts show that TDS was considering the use of the Biloxi switch from the moment it acquired its interest in La Star on July 31, 1987. The evidence shows that Nelson's October 23, 1987 conversation with James Creekmore was not made at the behest of Mr. Crenshaw or Mr. Belendiuk. And Nelson was not acting merely as a "door opener".

III

When he contacted the Creekmores in 1987-1988, Nelson was pursuing TDS' goal of building and ultimately gaining control over a system serving a "cluster" of markets surrounding the Biloxi-Gulfport and Pascagoula, Mississippi MSAs -- and possibly extending west through St. Tammany Parish to the Baton Rouge, Louisiana MSA.

Central to TDS' strategy was its power to gain control over the entire "cluster" of operations by forcing SJI out of St. Tammany Parish and Potosi out of Biloxi/Pascagoula. TDS had that power because of the so-called "escape clause" in the La Star

Joint Venture Agreement and because it held a "shotgun" to Potosi's head.

Nelson testified in litigation with Potosi that any market that was adjacent to Biloxi/Pascagoula and linked by interstate roads was "extremely valuable" to TDS. TDS obviously felt that St. Tammany Parish could be part of the Biloxi/Pascagoula "cluster" that was under construction in 1987.

IV

When TDS acquired its interest in La Star on July 31, 1987, Nelson was obviously aware that a system in St. Tammany Parish could be operated through the Biloxi switch that was being installed. He also knew that TDS was in the position to gain complete control over the Biloxi switch and the Mississippi Gulf Coast system by virtue of the "shotgun" it held at Potosi.

Nelson's call to the Creekmores about a switch sharing arrangement for La Star's "interim operation" was not the "initial contact" with the Creekmores. Nelson called James Creekmore about the La Star amendment on October 23, 1987, and there was no discussion of a possible switch sharing agreement.

Nelson's call to James Creekmore was anything but "trivial". It was the Friday before the Monday filing deadline for the La Star amendment, and La Star's engineer, Richard Biby, needed a decision on what he could say in his engineering statement about the overlap into Biloxi. And because no one within SJI was working on the amendment, Biby certainly would not have gone to Mr. Crenshaw for a decision.

V

The most damaging evidence against TDS is the single notation that Wade H. Creekmore, Jr. made on February 17, 1988, that Belendiuk "would call Don Nelson for a decision." As was the case with respect to Nelson's call to James Creekmore in October 1987, Nelson's call to Wade Creekmore was made on the eve of an important filing deadline -- La Star's February 29, 1988 deadline for seeking interim operating authority. As was the case in October 1987, Nelson wanted the Creekmores to allow La Star to make certain representations to the Commission. And just before Belendiuk stated that he would look to Nelson for a "decision", Wade Creekmore had warned Belendiuk not to "put anything in the application that we don't like".

The only reasonable inference that can be drawn, based on Potosi's evidence and the La Star record, was that Belendiuk called Nelson for a "decision" on what to include in the application for interim operating authority that La Star was preparing for filing on February 29, 1988.

VI

The facts that have come to light here show, once again, that TDS should never be entrusted with "shotgun" provisions. Such provisions are weapons that TDS uses in its persistent efforts to wrest control of cellular systems in contravention of the Commission's eligibility restrictions.

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FEDERAL COMMUNICATIONS COMMISSION
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90-257)

To: The Commission

RESPONSE TO REPLY

Potosi Company ("Potosi"), by its attorneys, responds to the reply filed by United States Cellular Corporation ("USCC") ^{1/}, a subsidiary of Telephone and Data Systems, Inc. ("TDS") ^{2/}, in the proceeding it instituted to avoid the effect of Footnote 3 of the Commission's decision in CC Docket No. 90-257. See La Star Cellular Telephone Co., 7 FCC Rcd 3762, 3767 n. 3 (1992).

I. Introduction

1. Potosi presented documentary evidence refuting TDS' claim that USCC's President, H. Donald Nelson, was not involved in La Star activities in 1987-88. ^{3/} TDS' first response to Potosi's evidence was to level the following charge:

Pursuing its campaign against USCC into yet another proceeding, Potosi . . . claims that "documents" it has "uncovered" support the

-
- ^{1/} See USCC, Reply to Oppositions (filed Mar. 9, 1993) [hereinafter "Reply"].
- ^{2/} We will most often refer to TDS and its subsidiaries and affiliates, including USCC, collectively as "TDS". La Star Cellular Telephone Company will be referred to as "La Star".
- ^{3/} See Potosi, Opposition to Petition, at Tabs 1 & 2 (filed Feb. 18, 1993) (Declarations of James H. Creekmere, Sr. and Wade H. Creekmere, Jr.) [hereinafter "Opposition"].

position that a USCC subsidiary was in control of La Star, Potosi's claim is false, indeed absurd. ^{4/}

2. Regardless of whether that claim is "absurd" or not, Potosi never made it. Potosi claimed only that its evidence called into question TDS' candor. ^{5/}

3. Potosi alleged that records of telephone conversations dating back to 1987 and 1988 constituted probative, documentary evidence that Nelson was personally involved in significant La Star activities; that he was capable of "orchestrating" the activities of La Star's attorney, Arthur Belendiuk, and its consulting engineers; and that Mr. Belendiuk considered Nelson to be a decision-maker. ^{6/}

4. TDS never challenged the authenticity of the documents, nor disputed their accuracy. ^{7/} Rather, TDS brought Nelson and Belendiuk forward to suddenly (albeit "vaguely") remember tele-

^{4/} See Reply, supra note 1, at 4 (emphasis original).

^{5/} See Opposition, supra note 3, at 2, 5-9.

^{6/} See id. at 9.

^{7/} The accuracy of the memos can be independently verified by the Commission's own records. For example, James H. Creekmore, Sr., noted on October 23, 1987 that the La Star amendment was "due Monday". See Opposition, supra note 3, Tab 1, at Exhibit 1. The accuracy of that notation can be substantiated by examining the relevant notice issued by the Commission. See Public Notice, Rep. No. CL-87-338, at 8 (Sept. 18, 1987). Similarly, Mr. Creekmore's notes of February 9, 1988 indicated that La Star wanted to file for interim operating authority "before Feb. 27". See Opposition, supra note 3, Tab 1, at Exhibit 2. February 27, 1988 was a Saturday. The fact that La Star filed its application on Monday, February 29, 1988, is a matter of public record.

phone conversations they had more than five years ago. 8/

5. It is quite remarkable that Nelson and Belendiuk can now recall telephone conversations in late 1987 and early 1988, considering neither possessed "contemporaneous records" of the conversations. 9/ What is not remarkable is that their recollections do not square with the facts.

6. Belendiuk seems to recall that in late 1987 Sinclair Crenshaw of SJI Cellular, Inc. ("SJI") came up with the idea of having Nelson contact James Creekmore to secure "the consent of the Biloxi wireline licensee to a switch sharing agreement and a 39 dbu contour extension into the Biloxi MSA" that would result from La Star's proposed interim operation. 10/ The claim that Mr. Crenshaw had to suggest such switch sharing to Nelson simply is not credible, considering the history of TDS' relationship with the Creekmores.

7. The facts show that TDS was considering the use of the Biloxi switch from the moment it acquired its interest in La Star on July 31, 1987. The evidence shows that Nelson's October 23, 1987 conversation with James Creekmore was not made at the behest of Mr. Crenshaw or Mr. Belendiuk. And Nelson was not acting merely as a "door opener". 11/

8/ See Reply, supra note 1, Belendiuk Declaration, at 1.

9/ See id., Nelson Declaration, at 1, Belendiuk Declaration, at 1.

10/ See id., Belendiuk Declaration, at 1.

11/ See id., at 9.

8. When he contacted the Creekmores in 1987-1988, Nelson was pursuing TDS' goal of building and ultimately gaining control over a system serving a "cluster" of markets surrounding the Biloxi-Gulfport and Pascagoula, Mississippi MSAs -- and possibly extending west through St. Tammany Parish to the Baton Rouge, Louisiana MSA. ^{12/} That strategy was necessary because TDS had no "presence" in any of these markets, and was therefore ineligible to seek the initial wireline authorization.

9. Central to TDS' strategy was its power to gain control over the entire "cluster" of operations by forcing SJI out of St. Tammany Parish and Potosi out of Biloxi/Pascagoula. TDS had that power because of the so-called "escape clause" in the La Star Joint Venture Agreement ^{13/} and because it held a "shotgun" to Potosi's head. ^{14/} TDS has already tried to force BellSouth

^{12/} In his sworn statement to Administrative Law Judge Chachkin in the La Star hearing, Nelson represented that TDS obtained its interest in La Star "incident" to its acquisition of the "majority economic interest" in the wireline cellular license in the Baton Rouge MSA, and that the La Star interest "was (and remain[ed]) far less important than the Baton Rouge interest." See United States Cellular Corporation Exhibit Number 1, CC Docket No. 90-257, at 9 (Mar. 14, 1991). A copy of Nelson's statement is provided at Tab 1 infra.

^{13/} La Star Cellular Telephone Co., 6 FCC Rcd 6860, 6863 (A.L.J., 1991) [hereinafter Initial Decision]. Judge Chachkin found that the "escape clause" in the original Joint Venture Agreement was a "buyout provision". See id. TDS inherited the agreement, without change, when it acquired its interest in La Star on July 31, 1987. See id. at 6865.

^{14/} See Potosi, Petition for Declaratory Ruling, File No. MSD-91-26, at Tab 1 (filed July 9, 1991).

Mobility, Inc. out of Baton Rouge. ^{15/}

10. Much of the facts that will follow are intended to provide the context in which the Commission should view the most damaging evidence against TDS -- the single notation that Wade H. Creekmore, Jr. made on February 17, 1988, that Belendiuk "would call Don Nelson for a decision." ^{16/} The only reasonable inference that can be drawn, based on Potosi's evidence and the La Star record ^{17/}, was that Belendiuk called Nelson for a "decision" on what to include in the application for interim operating authority that La Star was preparing for filing on February 29, 1988.

II. Discussion

A. The TDS Strategy

11. TDS' cellular acquisition and operating strategies shared two key components. First, as Mr. Nelson put it in litigation with Potosi, TDS wanted to "maximize [its] operating position" in any cellular joint venture. ^{18/} In Mr. Nelson's words,

^{15/} See, e.g., Potosi, Second Supplement, File No. MSD-91-26, at 4-7 (filed Oct. 9, 1992).

^{16/} See Opposition, supra note 3, at Tab 2.

^{17/} It is important to note that TDS is not disputing the facts in the La Star record. See Opposition of United States Cellular Corporation to Request for an Order to Show Cause, File No. MSD-92-39, at 24 (filed Aug. 12, 1992). In any event, Judge Chachkin's findings of fact have been affirmed by the Commission.

^{18/} See infra Tab 2, at 176 (Nelson's testimony in a deposition given on October 30, 1989 in Franklin Telephone Co., Inc. v. Telephone and Data Systems, Inc., Cause No. 10,360 (Ch. Franklin County Ct., Miss. filed Aug. 9, 1988)).

"we wanted to be the operator". 19/ Second, TDS wanted to acquire and operate market "clusters". 20/ And, clearly, TDS wanted to acquire and operate a system serving the "cluster" of markets surrounding the Mississippi Gulf Coast (the Biloxi-Gulfport and Pascagoula MSAs).

12. From the beginning of the relationship between TDS and the Creekmores, Nelson had the understanding that TDS would build, operate and manage the joint venture's cellular systems. 21/ And Nelson claimed that TDS had done most of the preliminary work for the Biloxi/Pascagoula construction, when a dispute broke out with the Creekmores in October 1986 over the management of the system. 22/

13. The Creekmores wanted to have the Biloxi/Pascagoula management functions "split equally". 23/ TDS wanted to be the sole manager, because Nelson's experience had been "that someone's got to have the responsibility to get the whole job

19/ See infra Tab 2, at 176-77.

20/ Attached hereto at Tab 3 is a map of TDS' cellular operations that was included in a 1990 prospectus. The Commission will note that TDS tries to "cluster [its] operations." A recent TDS news release touting the strength of its "market clusters" is provided at Tab 4 hereto.

21/ See infra Tab 5, at 268 (Nelson's trial testimony in Franklin v. TDS). According to Mr. Nelson "We had the experience. We had the team in place. We were rolling. We were building other markets." Id.

22/ See id. at 60-62; 270-75. See infra Tab 6 (Trial Exhibit 34 in Franklin v. TDS).

23/ See id. at 279.

done". 24/

14. Nelson was of the opinion that any market that was adjacent to Biloxi/Pascagoula and linked by interstate roads was "extremely valuable" to TDS. 25/ Mississippi RSA 11 was significant to Nelson because it is "adjacent to the Biloxi/Pascagoula markets, directly north thereof, also adjacent on the west to New Orleans." 26/ It is for that reason that Nelson was preparing to file for all the RSAs in "mid to south Mississippi" as early as 1986.

15. TDS tried to have Cellular South, Inc. ("Cellular South"), its joint venture with the Creekmores, acquire the rights to operate in six Mississippi RSAs, including Mississippi 11. And TDS eventually sued the Creekmores when they refused. 27/

16. TDS obviously felt that St. Tammany Parish could be part of the Biloxi/Pascagoula "cluster" that was under construction in 1987. Indeed, Mr. Nelson described a "cluster" in his 1989 deposition as follows:

A cluster is where you have some markets that are either close to each other or adjacent to each other, could be a cluster of markets.

In the MSA terms this meant such markets as Biloxi/Pascagoula. That would be a cluster. Now if you could have a bigger cluster, you'd

24/ See infra Tab 5, at 279.

25/ See infra Tab 2, at 16.

26/ Id.

27/ See Amended Answer and Counterclaim at 5-10, Franklin v. TDS (filed Dec. 29, 1988).

add New Orleans to that 28/

17. Nelson had been involved with the plans for the Biloxi/Pascagoula switch since early 1987. He had been active in "exploring alternatives as to how we could minimize the cost for the system by possibly working off of the switching system either out of BellSouth out of New Orleans or of Contel out of Mobile." 29/ He ultimately concluded that "it was better and lower cost for the joint venture to build their own freestanding system." 30/

18. When TDS acquired its interest in La Star on July 31, 1987, Nelson was obviously aware that a system in St. Tammany Parish could be operated through the Biloxi switch that was being installed. He also knew that TDS was in the position to gain complete control over the Biloxi switch and the Mississippi Gulf Coast system by virtue of the "shotgun" provision in the Shareholders' Agreement with Potosi.

19. After TDS acquired its interest, La Star's management committee met only once, in August 1987, when Mr. Crenshaw and two others flew to Chicago to meet with senior TDS management, including Nelson. 31/ According to Nelson, "[t]here were no actions proposed at that initial meeting." 32/ Mr. Crenshaw, how-

28/ See infra Tab 2, at 113.

29/ See infra Tab 5, at 274.

30/ Id.

31/ See Initial Decision, 6 FCC Rcd at 6866.

32/ Id.

ever, indicated that the "general direction" of that lone meeting was that all La Star application preparation responsibilities would be borne by TDS. 33/

20. The first order of business after the August meeting was to prepare the amendment to La Star's application for St. Tammany Parish. And the amendment that was filed on October 26, 1987 is inconsistent with Belendiuk's current "recollection".

B. The October 1987 Amendment

21. Belendiuk remembers speaking with Mr. Crenshaw in late 1987 about La Star's "proposed interim operation in St. Tammany Parish . . . and discussing the desirability of securing the consent of the Biloxi wireline licensee to a switch sharing arrangement and to a 39 dbu contour extension into the Biloxi MSA." 34/ According to Belendiuk, they agreed that it might be useful to ask Nelson to make the "initial contact" with the Creekmores. 35/ Belendiuk has "no recollection of the part to be played by Mark Peabody of Richard Biby's firm." 36/

22. The fact of the matter is that Nelson's call to the Creekmores about a switch sharing arrangement for La Star's

33/ See Initial Decision, 6 FCC Rcd at 6866.

34/ Reply, supra note 1, Belendiuk Declaration, at 1.

35/ Id.

36/ Id. For his part, Nelson does remember being asked to introduce Mr. Peabody to the Creekmores. See id., Nelson Declaration, at 2. Nevertheless, TDS claims that Crenshaw and Belendiuk concluded that Peabody would handle some of the "actual negotiations" with the Creekmores. See id., at 8-9.

"interim operation" was not the "initial contact" with the Creekmores. Nelson called James Creekmore about the La Star amendment on October 23, 1987, and there was no discussion of a possible switch sharing agreement. 37/

23. James Creekmore's memo of his three telephone conversations on October 23, 1987 indicated that Nelson called to inform him that one of the cells planned for St. Tammany Parish "incurs 5-7% into Biloxi MSA". 38/ Mr. Creekmore recollects, based on his memo, that Nelson wanted Cellular South to consent to the 39 dbu contour extension. 39/ Nelson requested that Mr. Creekmore discuss the extension with Mark Peabody. 40/

24. Mr. Creekmore placed his call to Mr. Peabody at 2:30 that Friday afternoon. 41/ During that conversation, Mr. Peabody asked the Creekmores to consent to the extension into Biloxi. Mr. Creekmore noted, "They want us to say it is O.K. because it would be mutually beneficial, handoff, etc." 42/

37/ There were good reasons why a switch sharing agreement was not discussed in October 1987. First, the Biloxi switch had yet to be installed. Secondly, if it was to amend to propose to use the Biloxi switch, there would not only have been a substantial change in the technical proposal, but La Star's capital costs would have decreased by at least \$500,000. Such substantial changes in La Star's technical proposal and financial showing could have resulted in a prohibited, major amendment. See Armstrong Telephone Co., 3 FCC Rcd 1665, 1666 (1988).

38/ See Opposition, supra note 3, Tab 1, at Exhibit 1.

39/ See id., at Tab 2, Declaration, at 1.

40/ See id., Tab 1, at Exhibit 1.

41/ Id.

42/ Id.

25. Mr. Peabody told Mr. Creekmore that the La Star amendment was "due Monday morning". 43/ When Mr. Creekmore said he would call him back on Monday, Mr. Peabody apparently suggested, as an alternative, that La Star could "say [USCC] has an interest in Biloxi and this would help in handoff, etc." 44/

26. Mr. Creekmore called Mr. Peabody back "5/10 min. later" and told him that Cellular South was "non-committal at this time." 45/

27. The La Star amendment was filed the next Monday, which was the deadline established by the Commission for filing amendments. 46/ Exhibit E to the amendment was an undated engineering statement given under penalty of perjury by Richard L. Biby, P. E. 47/

28. Mr. Biby stated that the proposed Cell 2 extension (12.5% of the cell) into Biloxi was "vital to providing continuous service to subscribers along Interstates I-10, I-59, and State Hwy 11." 48/ Mr. Biby proceeded to make the following representations:

Cell 2 [the Pearl River site] will also provide handoff and link up capabilities with

43/ See Opposition, supra note 3, Tab 1, at Exhibit 1.

44/ See id.

45/ See id.

46/ See Public Notice, supra note 7.

47/ A copy of Mr. Biby's statement is attached at Tab 7.

48/ See infra Tab 7, at 11.

the adjacent Biloxi-Gulfport, MS MSA. [USCC] the minority partner for the instant La Star application is also the minority partner in POTOSI. POTOSI (formerly Mississippi Cellular, Inc.) is the wireline licensee for the Biloxi-Gulfport, MS cellular system. [USCC] has indicated that the de minimis extension of La Star's Cell #2 will ultimately provide a degree of mutual benefit for the two systems by providing a continuity of service and an increased system efficiency for cellular users in the area. ^{49/}

29. The Commission has already determined that TDS prepared virtually all of La Star's 1987 amendment. ^{50/} The TDS effort was apparently spearheaded by Nelson. ^{51/} And Nelson testified in the La Star hearing "that he did not discuss the amendment with [SJI President John] Brady and received no specific requests from SJI or the management committee." ^{52/}

30. The facts strongly suggest that Nelson's call to James Creekmore was anything but "trivial". ^{53/} It was the Friday before the Monday filing deadline, and Biby needed a decision on what he could say in his engineering statement about the overlap into Biloxi -- an issue of obvious significance. ^{54/} And because

^{49/} See infra Tab 7, at 11 (emphasis added).

^{50/} See La Star, 7 FCC Rcd at 3763, 3765-66. Administrative Law Judge Chachkin found that TDS "basically did everything". Initial Decision, 6 FCC Rcd at 6866.

^{51/} See La Star, 7 FCC Rcd at 3765-66.

^{52/} See id., at 3766.

^{53/} See Opposition, supra note 1, at 9-10.

^{54/} If the extension was not considered de minimis, the La Star amendment was subject to rejection. See, e.g., Alltel (continued...)

no one within SJI was working on the amendment ^{55/}, Biby certainly would not have gone to Mr. Crenshaw for a decision. He obviously went to Nelson, who was, after all, paying his bills. ^{56/}

31. It is clear from the face of the amendment that TDS made the decision on what Biby should represent about the overlap. Biby stated, under penalty of perjury, that USCC had "indicated" that the extension would be of "mutual benefit" to the St. Tammany Parish and Biloxi systems.

32. With time running out to file the amendment, the decision was made to go with the alternative suggested by Peabody in his conversation with James Creekmore. Biby represented that USCC -- and not the Creekmores -- felt that the overlap would be "mutually beneficial".

C. The February 1987 Decision

33. It bears repeating that Belendiuk remembers that his discussion with Mr. Crenshaw concerning a possible interim switch sharing agreement with the Creekmores and the contour extension into Biloxi took place in "late 1987". There is no explanation offered why Belendiuk discussed such technical matters with

^{54/} (...continued)

Cellular Associates of the Carolinas, 61 RR 2d 225, 227-28 (Com. Car. Bur., 1986). Any concern about the matter would be removed if Cellular South consented to the extension. See Bell Atlantic Mobile Systems of Philadelphia, 2 FCC Rcd 7531, 7531 (Com. Car. Bur., 1987).

^{55/} See Initial Decision, 6 FCC Rcd at 6866.

^{56/} See id.

Mr. Crenshaw, who was a lawyer and a CPA, and who considered himself La Star's "House Counsel" and its "contact point" for tax matters. 57/

34. It is significant that Mr. Crenshaw did not come forward with his recollection. That is not surprising, however, in light of Judge Chachkin's finding that "[n]one of the exhibits for the interim filing were prepared by SJI or even coordinated with SJI." 58/ In fact, Mr. Crenshaw first became involved in engineering matters after La Star was designated for hearing in 1990. 59/

35. While Mr. Crenshaw was alleged to have "agreed" in late 1987 that Nelson should make the "initial contact" with the Creekmores concerning switch sharing (but Belendiuk would handle the "actual negotiations") 60/, Nelson did not call James Creekmore until February 9, 1988 -- less than three weeks before La Star's deadline to submit its application for interim operating authority. 61/

57/ See Initial Decision, 6 FCC Rcd at 6869.

58/ Id.

59/ See id., at 6868.

60/ See Reply, supra note 3, Belendiuk Declaration, at 1.

61/ New Orleans CGSA, Inc. was granted an STA on September 28, 1987 to provide interim service to St. Tammany Parish for 180 days. See Public Notice, supra note 7, at 8. Accordingly, the STA would expire on March 28, 1988. After his conversation with Belendiuk on February 9, 1988, James Creekmore noted, "They are trying [to] get a decision by Mar. 27, so they'll need to file before Feb. 27." See Opposition, supra note 3, Tab 1, at Exhibit 3.

36. Nelson's February 9 call to James Creekmore was intended to put Belendiuk "in touch" with the Creekmores. 62/ But Nelson also conveyed the message to Mr. Creekmore that La Star was "planning to propose using our switch". 63/

37. Nelson got Belendiuk to call Mr. Creekmore right back. In that conversation, and in a second conversation on February 16, 1988, Belendiuk tried to persuade the Creekmores to allow La Star to make two significant representations in its upcoming application for interim operating authority -- that La Star could operate through the Biloxi switch on an interim basis and that Cellular South consented to the de minimis contour extension into the Biloxi MSA. 64/

38. Belendiuk's attempt to negotiate a switch sharing arrangement culminated in the critical telephone conversation with Wade H. Creekmore, Jr. on February 17, 1988 -- ten days before the filing deadline. Belendiuk was advised, apparently in no uncertain terms, that the Creekmores "were not willing to have anything in their application for interim North New Orleans service which would indicate in any way that we agree to La Star's use of our switch." 65/

39. Belendiuk then apparently turned his attention to the

62/ See Opposition, supra note 3, Tab 1, at Exhibit 2.

63/ See id.

64/ See id., at Exhibits 3, 5.

65/ See id., at Tab 2.

matter of the 39 dbu contour extension. Wade Creekmore indicated that the extension depicted on the 39 dbu coverage map provided by Mr. Biby was not objectionable. 66/ What followed was recorded by Mr. Creekmore:

I also told him that if they put anything in the application that we don't like - that we would probably oppose it. He then said we understand each other very well and he would call Don Nelson for a decision. It was an amicable conversation. Don Nelson will probably call to discuss it and our position should probably be that this has nothing to do with Cellular South at this stage and that Cellular South has nothing to gain and could have something to lose - that we are not willing to help La Star. 67/

40. Belendiuk now claims that he cannot identify the "decision" Nelson was to make. He "can only deduce" that "it may have been a decision about whether to call Mr. Creekmore again to seek to persuade to allow La Star to use [the Biloxi] switch". 68/ We think that a much more plausible inference can be drawn from the context in which Belendiuk stated that Nelson would make the "decision".

41. Nelson only found it necessary to call the Creekmores twice ostensibly on behalf of La Star. Both times Nelson made the call on the eve of an important filing deadline. Both times Nelson wanted the Creekmores to allow La Star to make certain

66/ Mr. Biby had faxed a copy of the contour map to James Creekmore on February 16, 1988. See Opposition, supra note 3, Tab 1, at Exhibit 4.

67/ See id., at Tab 2 (emphasis added).

68/ See Reply, supra note 1, Belendiuk Declaration, at 2.

representations to the Commission. And just before Belendiuk stated that he would look to Nelson for a "decision", Wade Creekmore had warned Belendiuk not to "put anything in the application that we don't like".

42. We can only "deduce" that Belendiuk was going to call Nelson to decide what La Star would "put" in the application. And the interim application that was filed ten days later entirely supports that conclusion.

43. The interim operating system proposed by La Star on February 29, 1988, did not mention the Biloxi switch. 69/ The Pearl River cell site, which had caused the troublesome extension into the Biloxi MSA, had been dropped. 70/ And when justifying a very slight 39 dbu contour overlap into Biloxi, La Star did not employ the language it used in October 1987 to suggest that Cellular South -- or any entity holding an interest in Cellular South -- consented to the extension or agreed that it would be "mutually beneficial". 71/

69/ La Star proposed capital costs totalling \$650,000 for "MTSO and Control Equipment". See Application of La Star for Interim Operating Authority in the Northern Portion of the New Orleans MSA, File No. 27161-CL-P-83, Exhibit 5, at Table 1 (filed Feb. 29, 1988).

70/ See id., at Exhibit 3. A copy of the cited exhibit is attached hereto at Tab 8.

71/ In October 1987, La Star represented that USCC held a minority position in Potosi, and that USCC had "indicated" that the extension into Biloxi would be of "mutual benefit". See supra note 49 and accompanying text. In February 1988, La Star made no mention of USCC's interest in Potosi. And La Star offered only its own opinion that the extension would be of "mutual benefit". See infra Tab 8, at 2.

44. It is clear that Nelson heeded the warning that Wade Creekmore conveyed to Belendiuk. Nelson decided not to "put anything" in the application that the Creekmores would not "like".

III. Conclusion

45. TDS relies entirely on Belendiuk's alleged conversation in late 1987 with Mr. Crenshaw to rebut the impact of Potosi's evidence. But even if that one conversation took place -- which Mr. Crenshaw has not substantiated -- it would not explain Nelson's contact with the Creekmores in October 1987. For Belendiuk specifically remembered that he discussed La Star's proposed interim operation (including possible switch sharing) with Mr. Crenshaw, and that matter was not discussed by Nelson in October 1987.

46. Of course, the most damaging evidence against TDS was Wade Creekmore's single notation that Belendiuk "would call Don Nelson for a decision". Belendiuk could not deny that he made that statement. And he could not explain why he would make such a statement, if, as he claims, Nelson never made any "decisions".

47. The Commission is left with the responsibility to draw the proper inferences from the largely undisputed facts. We respectfully submit that a strong inference can be drawn, based on the La Star record and Potosi's new evidence, that Belendiuk called Nelson for a decision on what to include in the 1988 La Star application. After all, it was Nelson who claimed under oath in 1989 that "someone's got to have the responsibility to get the whole job done". And the Commission has already deter-

mined that the 1988 application was "not even coordinated with SJI." 72/

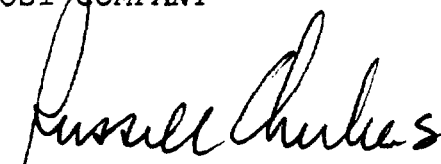
48. If the Commission draws the strong inference that Nelson was a La Star decision-maker, then a hearing on TDS' candor must be held. For the law is clear that a strong inference on an ultimate fact can give rise to a substantial question of fact under 47 U.S.C. § 309(d)(2). Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985).

49. Finally, and perhaps most important to Potosi, the facts that have come to light here show, once again, that TDS should never be entrusted with "shotgun" provisions. Such provisions are weapons that TDS uses in its persistent efforts to wrest control of cellular systems in contravention of the Commission's eligibility restrictions.

Respectfully submitted,

POTOSI COMPANY

By



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April 8, 1993

72/ Initial Decision, 6 FCC Rcd at 6869.